

NOTICE
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2014 IL App (5th) 100177-U
NO. 5-10-0177
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Christian County.
)	
v.)	No. 04-CF-16
)	
TIMOTHY W. BUSH,)	Honorable
)	Ronald D. Spears,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Presiding Justice Welch and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* Although postconviction counsel filed a certificate with the caption that it was pursuant to Illinois Supreme Court Rule 604(d), postconviction counsel complied with Illinois Supreme Court Rule 651(c) because the contents of the certificate were consistent with the requirements of Rule 651(c) and counsel's conduct before the court showed compliance.

¶ 2 The defendant, Timothy W. Bush, appeals the circuit court's third-stage denial of his *pro se* petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-8 (West 2008)). The defendant contends that he received the unreasonable assistance of postconviction counsel because postconviction counsel failed to file a proper certificate under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). The State counters that we should affirm because the defendant received the reasonable assistance of counsel. We affirm.

¶ 3 **BACKGROUND**

¶ 4 On July 19, 2005, the defendant pled guilty to two counts of attempted first-degree

murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)) and was sentenced to two consecutive 10-year terms of imprisonment. On June 5, 2008, the defendant filed his *pro se* petition for postconviction relief pursuant to the Act. In his petition, the defendant alleged the ineffective assistance of trial counsel, claiming that he had pled guilty based on his trial counsel's erroneous advice that there were no available defenses in his case and that trial may result in a "natural life" sentence. The defendant contended that trial counsel should have put forth the affirmative defenses of insanity and involuntary intoxication by asserting that the defendant had a history of mental illness and was taking psychotropic medication. The 90-day period for review expired without the circuit court's dismissal of the defendant's petition. Accordingly, the circuit court appointed postconviction counsel for the defendant and ordered the State to answer or move to dismiss. On April 2, 2009, the State filed a motion to dismiss the defendant's postconviction petition.

¶ 5 On October 5, 2009, postconviction counsel filed a certificate entitled "Certificate of Compliance with Rule 604(d)." In this certificate, postconviction counsel certified that he had "consulted with [the] [d]efendant personally to ascertain his contentions of error, *** examined the trial court file and report of proceedings of the sentencing hearing[,], and made any amendments to the motion necessary for adequate presentation of any defects in the proceedings."

¶ 6 The matter proceeded to an evidentiary hearing held on March 30, 2010, wherein postconviction counsel called the defendant's trial counsel to testify. Trial counsel testified that he did not advise the defendant that he would receive a natural life sentence if found guilty at trial. Trial counsel testified that he instead advised the defendant that he could face 25 to 30 years on each count, which would be equivalent to a life sentence for him, given his age. Trial counsel further testified that although he had filed an election notice of the affirmative defense of insanity, he considered insanity and the defense of involuntary

intoxication not viable in the defendant's case.

¶ 7 Postconviction counsel also called Mike Crawley, the defendant's brother, to testify. Crawley testified that he thought the defendant was asserting an insanity defense at trial; however, trial counsel indicated that they could not win the case and that the defendant would probably be sentenced to 66 years in prison if he went to trial. Crawley did not recall any discussion about a natural life sentence. Crawley testified that on the day the defendant pled guilty, the defendant was able to talk and understand what was going on and make a decision one way or the other on the plea. After the evidentiary hearing, the circuit court denied the defendant's postconviction petition. The present appeal followed.

¶ 8 ANALYSIS

¶ 9 The defendant argues that counsel's failure to comply with Rule 651(c) requires a remand for a new evidentiary hearing and for compliance with both the Act and Rule 651(c). The defendant argues that the certificate is defective, does not reflect that counsel read the guilty plea transcript, and does not reflect that counsel made any necessary amendments to the defendant's petition. The defendant further argues that the record does not otherwise establish compliance. We disagree.

¶ 10 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2008). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court has 90 days to independently assess the defendant's petition and summarily dismiss it if the court finds it "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition is not dismissed at the first stage or if the circuit court fails to rule on it within 90 days, the petition must be

docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2008).

¶ 11 At the second stage, the circuit court must determine whether the petitioner is indigent and, if so, whether he wishes to have counsel appointed to represent him. 725 ILCS 5/122-4 (West 2008). After an appointment, Illinois Supreme Court Rule 651(c) requires counsel: (1) to consult with the defendant by mail or in person to ascertain his contentions of deprivation of constitutional right; (2) to examine the record of the proceedings at the trial; and (3) to make any amendments that are necessary to the petition previously filed by the *pro se* defendant. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007); *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006).

¶ 12 After appointed counsel has made any necessary amendments to the petition, the State may file a motion to dismiss it. 725 ILCS 5/122-5 (West 2006); *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 13. "If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage." *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 13. At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001).

¶ 13 "At both the second stage and the third stage, the defendant bears the burden of making a substantial showing that his conviction resulted from a violation of a constitutional right." *People v. Lane*, 398 Ill. App. 3d 287, 296 (2010). "We use a deferential standard in reviewing a trial court's decision after an evidentiary hearing on a postconviction petition, reversing only if the decision was manifestly erroneous." *People v. Ford*, 368 Ill. App. 3d 562, 567 (2006). "A decision is manifestly erroneous only if it contains error that is 'clearly evident, plain, and indisputable.' " *People v. Frieberg*, 305 Ill. App. 3d 840, 847 (1999) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 14 Because the right to postconviction counsel is a statutory right rather than a constitutional one, a postconviction petitioner is only entitled to a "reasonable level of assistance," which "includes compliance with the obligations of Rule 651(c)." *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). "Post-conviction counsel is only required to investigate and properly present the *petitioner's* claims" (emphasis in original) (*People v. Davis*, 156 Ill. 2d 149, 164 (1993)), however, and "[w]hile postconviction counsel *may* conduct a broader examination of the record [citation], and may raise additional issues if he or she so chooses, there is no obligation to do so" (emphasis in original) (*Pendleton*, 223 Ill. 2d at 476). Additionally, postconviction counsel "is under no obligation to actively search for sources outside the record that might support general claims raised in a post-conviction petition." *People v. Johnson*, 154 Ill. 2d 227, 247 (1993).

¶ 15 In the present case, postconviction counsel filed a certificate entitled "Certificate of Compliance with Rule 604(d)," as opposed to entitling it as a certificate of compliance with Rule 651(c). Nonetheless, he certified that he had consulted with the defendant personally to ascertain the contentions of error, examined the trial court file and report of proceedings of the sentencing hearing, which would have included the circuit court's acceptance of the defendant's guilty plea, and made any amendments to the motion necessary for adequate presentation of any defects in the proceedings. See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984) (postconviction counsel shows by certificate that he "has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions"). Accordingly, although postconviction counsel filed a certificate with the caption that it was pursuant to Illinois Supreme Court 604(d) (eff. Dec. 13, 2005), the contents of the certificate were consistent with the requirements of Rule 651(c) ((eff. Dec.

1, 1984). See *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 14 (postconviction counsel complied with Rule 651(c) even though certificate was captioned 604(d) because contents of certificate were consistent with requirements of Rule 651(c) and counsel informed trial court that he had spoken with defendant and had reviewed petition).

¶ 16 The record of proceedings further supports the conclusion that postconviction counsel satisfied his duties pursuant to Rule 651(c). At a hearing on June 8, 2009, at which both postconviction counsel and the defendant were present, postconviction counsel reported that he had spoken to the defendant by telephone on May 5, at which time the two "went over his petition" and the defendant opted to stand on it as filed. At a hearing on October 20, 2009, at which both postconviction counsel and the defendant were again present, postconviction counsel requested a continuance on the defendant's behalf, noting that upon speaking with him, the defendant was awaiting materials not yet received in regard to the defenses that he wished had been pursued at trial. At the evidentiary hearing on March 30, 2010, postconviction counsel stated that he had spoken with the defendant at the Illinois River Correctional Center and again before the hearing. Postconviction counsel asserted that he and the defendant wanted the court to consider the communication between the defendant and trial counsel regarding defenses and penalties at trial. Likewise, the evidence and arguments put forth during the evidentiary hearing on the defendant's postconviction petition, including postconviction counsel's references to the guilty plea transcript, further support postconviction counsel's certifications that he consulted with the defendant to ascertain his contentions of deprivation of constitutional right and examined the record of the proceedings at the trial. See *People v. Williams*, 186 Ill. 2d 55, 59 n.1 (1999) (stating that because the filing rule is not one of strict compliance, the failure to file a proper affidavit certifying compliance with Rule 651(c) is harmless if the record demonstrates that counsel adequately fulfilled his or her duties).

¶ 17 The record further supports postconviction counsel's certification that he "made any amendments to the motion necessary for adequate presentation of any defects in the proceedings." On June 8, 2009, postconviction counsel supplemented the petition by filing the required affidavit (725 ILCS 5/122-2(b) (West 2008)). Further, on March 26, 2010, after consulting with postconviction counsel, the defendant filed a supplemental *pro se* petition for postconviction relief. Although postconviction counsel did not further amend the defendant's petition, our supreme court has held that postconviction counsel is not required to amend a petition to advance nonmeritorious claims. *Pendleton*, 223 Ill. 2d at 472; *People v. Greer*, 212 Ill. 2d 192, 205 (2004). "Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *Greer*, 212 Ill. 2d at 205. We find that postconviction counsel's improper labeling of a certificate, which was nevertheless consistent with the requirements of Rule 651(c), was harmless. See *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 14.

¶ 18 The defendant argues that because postconviction counsel did not attach and thereafter present at the evidentiary hearing defendant's mental health records, including Dr. Robert E. Chapman's report, which supported the defendant's insanity defense, the hearing on his postconviction petition was not fair, the outcome was unreliable, and Rule 651(c) was violated.

¶ 19 The record reveals that trial counsel investigated and filed a notice to assert the affirmative defense of insanity. After counsel filed notice of his intent to assert the affirmative defense of insanity, the defendant knowingly and voluntarily pled guilty. Had he not pled guilty and asserted the defense of insanity at trial, the defense would have had to prove, by clear and convincing evidence, that the defendant, because of a mental disease

or defect, lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. 720 ILCS 5/6-2 (West 2004); *People v. Burton*, 184 Ill. 2d 1, 26 (1998).

¶ 20 The defendant was indicted on two counts of armed violence, two counts of attempted first-degree murder, and five counts of aggravated battery, charged with stabbing his ex-girlfriend, June Yates, in addition to Kelly Wineburner, Lloyd J. Chesterman, and Steven Brown, at the Grain Systems Incorporated plant where the defendant had worked. In December 2004, trial counsel indicated that Dr. Chapman had reported that the defense of insanity would be available to the defendant, the State had a copy of the report, and the defense filed an election of the affirmative defense of insanity. In January 2005, the State motioned for an additional mental health exam, which the circuit court granted. On February 17, 2005, the State disclosed to the defense the identity of two witnesses who would testify at trial, along with the expected content of their testimony. Jimmy Richey, who worked with the defendant, was expected to testify that he gave defendant a ride home after work in September 2003, and the defendant had made threats to kill June Yates. Richey was also expected to testify as to a conversation he had with the defendant two days before the alleged occurrence wherein the defendant asked Richey threatening questions regarding the man June Yates was sitting with during work breaks. David Douglas, another coworker, would testify that the defendant had been watching the area where Kelly Wineburner was working for a period of time before the occurrence. On July 19, 2005, the defendant pled guilty to two counts of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)).

¶ 21 On appeal, the defendant seems to suggest that attaching and presenting Dr. Chapman's report in the postconviction proceedings would have conclusively demonstrated the defendant's ability to prove insanity at the time of the offense, and therefore, his trial counsel's ineffectiveness in advising him to plead guilty to two counts of attempted

first-degree murder. That Chapman's report predated the State's disclosure of witnesses Richey and Douglas aside, attaching and presenting Dr. Chapman's report would have shown merely that the insanity defense was available to the defendant at trial and was therefore a consideration in determining whether to plead guilty, which was clearly put forth by postconviction counsel during the evidentiary hearing. Indeed, at the hearing, the defendant testified that he repeatedly discussed with trial counsel the potential success of the insanity defense, that trial counsel advised that it would be difficult to prove, and that the defendant did not want to spend the rest of his life in an insane asylum. See 730 ILCS 5/5-2-4(a) (West 2004) ("After a finding or verdict of not guilty by reason of insanity ***, the defendant shall be ordered to the Department of Human Services for an evaluation as to whether he is subject to involuntary admission or in need of mental health services."). The defendant's testimony reveals that he was not misled or misinformed by his attorney but had been advised of the potential defenses in his case and voluntarily chose to plead guilty. See *People v. Janes*, 168 Ill. 2d 382, 387 (1995) ("defendant's conclusion that attorney *** rendered ineffective assistance of counsel does not necessarily follow from his claims of valid defenses").

¶ 22 The purpose of requiring a certificate is to make certain that the requirements of Rule 651(c), ensuring that postconviction petitioners receive adequate representation such that their claims of constitutional deprivation are set forth, have been met. We hereby conclude that postconviction counsel complied with the requirements of Rule 651(c) and that his failure to attach or present the defendant's mental health records did not amount to the unreasonable assistance of counsel. Accordingly, the circuit court properly denied the defendant's postconviction petition.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we affirm the court's judgment denying the defendant's petition for postconviction relief.

¶ 25 Affirmed.